INDEX

SUBJECT INDEX

Page

Reply Brief of Petitioners:

Provisions of Workmen's Compensation Act of the State of Washington do apply to the facts in this case 1

Petitioners have the legal capacity to sue 6

Appendix:

Laws of Washington, 1917, Chapter 123 11

CITATIONS

Acts of Congress:

Act of February 1, 1928 3-7

Acts of the State of Washington:

Workmen's Compensation Act: Ch. 74, Session Laws 1911 2-7

Act of 1917 amending Washington Wrongful Death Statute 6-8

Act of 1927 amending Workmen's Compensation Act 6

Cases:

Bixler v. Pennsylvania R. Co., 201 Fed. 553; Same case in lower court, 192 Fed. 919 8

Missouri, K. & T. Ro. Co. v. Wulf, 226 U. S. 570-78, 57 L. Ed. 355 8

State v. Cowlitz County, 146 Wash. 309 ..... 3, 8

Stewart v. Baltimore & Ohio R. Co., 168 U. S. 445-49, 18 Sup. Ct. 105, 42 L. Ed. 537 8

In the Supreme Court United States

October Term, 1933
No. 308

MAXINE MURRAY, on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, a Minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Reply Brief of Petitioners

The assignments of error and brief in the petition for certiorari constitute petitioners' opening brief.

Respondents in their answering brief, which was filed subsequent to the granting of certiorari, rely upon two points upon which they ask this Court to affirm the decision of the lower court. They are:

I. That the provisions of the Workmen's Compensation Act of the State of Washington do not apply to the facts in this case (Respondents' Brief, p. 9); and

II. That the petitioners do not have the legal capacity to sue (Respondents' Brief, p. 15).

I

Respondents have overlooked the facts pleaded (and admitted) in petitioners' complaint, which give the petitioners a right of action against the respondents. The Workmen's Compensation Act of the State of Washington did not abolish the right of action given to the dependents and beneficiaries of a decedent workman whose death was caused by the wrongful act or neglect of the employer, if the employer had failed and neglected to submit his payroll to the Department of Labor and Industries of the State and pay the premium to the State called for by the law. The act expressly provided that, if injury or death happened to a workman while the employer was in default in the payment of his premiums, the decedent workman's beneficiaries and dependents could bring an action against the employer the same as they could have under the law as it existed before the adoption of the Workmen's Compensation Act on March 14, 1911; in which event the employer was deprived of the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. Respondents, the employers of the decedent, Louis

Henry Murray, could have filed their payroll and paid the premiums thereon to the State and thereby secured to themselves the benefits of the law. This they failed to do and left themselves subject to suit with the defenses stated cut off, as stated by the Supreme Court of the State of Washington in the case of *State v. Cowlitz County,* 146 Wash. 309, as quoted at p. 16 of petitioners' Petition.

The arguments of respondents, therefore, as to the purpose, policy, etc., of the Workmen's Compensation Act of the State of Washington, its limits, application and construction, have no application under the facts alleged by the petitioners in their complaint in this action. The provisions of the Workmen's Compensation Act gave to the petitioners a right of action against the respondents the same as they had before the Workmen's Compensation Act was passed, and to prosecute the action in their own names, they were made a part of the law in force within the Puget Sound Navy Yard by the Act of Congress of February 1, 1928, the same as any other law of the State of Washington applicable to the facts.

The title of the Act of Congress of February 1, 1928, reads:

"An Act concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States."

In such actions, it says that "the rights of the parties shall be governed by the laws of the State" within which the accident occurred, and that "such right of action shall exist as though the place were under the jurisdiction of the State."

Language could not well be used to bring the laws of the state into effect applicable to the facts alleged by the petitioners in their amended complaint and govern the rights of the parties to the suit more clearly than this statute has. The statute is remedial in its effect and should be liberally construed so as to give the petitioners, the injured parties, the benefits intended. In this case the structural steel and all the material for the tower traveling crane was manufactured and prepared outside the Navy Yard. It was shipped there to be assembled and erected. The decedent, Louis Henry Murray, was so engaged and working at the time he was killed through the negligence of the respondents. It was being erected on a track just within one of the gate entrances to the Navy Yard. The crane moved on a track with its own power. It could just as well have been assembled and erected outside the gate upon the same track and moved

through the gate with its own power. Had the decedent been working upon this crane just outside the gate of the Navy Yard and been killed exactly in the manner he was killed while working upon the same crane within the Navy Yard, would it be contended for a moment, under those circumstances, that the provisions of the Workmen's Compensation Law of the State of Washington did not apply? If under those circumstances they did apply, then the Act of Congress of February 1, 1928, made them apply to this case within the Navy Yard where the decedent was killed

The very purpose of the act was to give redress to the dependents and beneficiaries of those who had met their death while working within the navy yards and government reservations who, before the passage of the Act of Congress of February 1, 1928, were left destitute and without redress. The name of the author of the bill, the late Honorable Thomas J. Walsh, Senator from the State of Montana, is alone sufficient to show the purpose of the bill. His every act and purpose and the uppermost thought in his mind during his long service was to enact laws that would give those who suffered loss through the wrongful act of another a remedy.

II

Respondents' argument under their second point, that the petitioners had no legal capacity to sue, is not well taken for the reason that, by the provisions of the Workmen's Compensation Act itself as amended by the 1927 amendment (see Appendix "A," p. 19 Petition, and Appendices I and II, pp. i-iv Brief of Respondents), the petitioners were not only expressly given the right (as sole dependents and beneficiaries of the decedent) to bring this action in their own names, but were required to do so. This 1927 amendment was in full force in the State of Washington at the time of the passage of the Act of Congress of February 1, 1928.

The 1917 amendment to the Washington Wrongful Death Statute, on which the respondents rely to sustain their contention that the petitioners have no legal capacity to sue, itself provided that the provi ons of the Workmen's Compensation Act and the 1927 amendment thereto giving the right and requiring the petitioners to bring the action in their names was not to be affected in any way by the 1917 amendment. (See copy 1917 Amendment, Appendix hereto). Sec. 5 of the 1917 Amendment to the Wrongful Death Statute of the State of Washington provided:

> "This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof."

Chapter 74 of the Laws of 1911 is the act properly known as the Washington Workmen's Compensation Act, passed March 14, 1911.

It is conceded by the respondents (p. 20 Brief of Respondents), that, under the laws of the State of Washington in force within the Navy Yard up till the time of the passage by Congress of the Act of February 1, 1928, the petitioners had the right to bring this action in their own names, as they have done.

Respondents base their argument that the Act of Congress of February 1, 1928, took away the right from the petitioners to prosecute this action in their own names, and ask this Court to construe the Act of Congress of February 1, 1928, as taking away rights which the petitioners had prior to the date of its enactment (that is, the right to bring this action in their own names), instead of giving to petitioners any additional rights to those they already had. It is conceded that the Act of 1917 of the Legislature of the State of Washington, passed subsequent to the time at which the United States government acquired the territory within the Navy Yard at Bremerton, Washington, had no application whatever to actions brought

under the Wrongful Death Statute of the State of Washington in force at the time the government acquired the lands within the limits of the Navy Yard.

We submit that, if the Act of Congress of February 1, 1928, put the 1917 amendment to the Washington Wrongful Death Statute in effect within the Navy Yard at Bremerton, then it put the provisions of the Workmen's Compensation Act giving the right to the dependents and beneficiaries of a decedent workman under the conditions referred to by the Supreme Court of the State of Washington in *State v. Cowlitz County, supra,* into effect also, as both laws were in force at the time the Act of Congress of February 1, 1928, went into effect; and that this action was properly brought in their own names.

This Court, in passing on who are the proper parties to bring an action to recover damages under a wrongful death statute has adhered to the doctrine that:

> "The important portion of the" law "is that which gives a right of action, and not that part which provides who may enforce it. The latter is an incidental provision." *Bixler v. Pennsylvania R. Co.,* 201 Fed. 553; citing *Stewart v. Baltimore & Ohio R. Co.,* 168 U. S. 445-449, 18 Sup. Ct. 105, 42 L. Ed. 537, and *Missouri, K. & T. R. Co. v. Wulf,* 226 U. S. 570-78; 57 L. Ed. 355; same case in lower court, 192 Fed. 919,

and, where the action was brought by the real parties in interest instead of the personal representative, has always permitted an amendment to be made correcting the error, if such it was.

It is respectfully submitted that, for the reasons advanced and assignments of error alleged, the judgment of the lower court should be reversed upon the merits and a new trial be granted to petitioners; and, in case this Court should hold that the personal representative of the decedent, Louis Henry Murray, was the proper party to bring this action to recover on account of his death, that the petitioner Maxine Murray (who is also the legal representative of her decedent husband, the widow, and, with her child, the real parties in interest, the sole heirs, dependents and beneficiaries and the parties to whom any recovery had must be paid), be made a party plaintiff in her capacity as the legal representative of the decedent also.

This same request was made to the Supreme Court of the State of Washington on the petitioners' appeal thereto in this case, in the following language:

> "However, should the Court differ * * * in remanding the case, the lower court should be directed to permit an order to be entered allowing the plaintiff to be made a party plaintiff in this action as the personal representative of the decedent, which she was and is—the administrator

of the decedent's estate—and be permitted to file an amended complaint in the lower court." (Original Transcript of Record, p. 45. Omitted in printing.)

This request we repeat in this Court.

Respectfully submitted,

WM. MARTIN,

Attorney for Petitioners.

APPENDIX

SESSION LAWS, 1917. CHAPTER 123.

RECOVERY OF DAMAGES FOR WRONGFUL DEATH.

An act granting a right to recover damages for the death of a person caused by the wrongful act, neglect or default of another, and repealing section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

Sec. 2. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as,

under all circumstances of the case, may to them seem just.

Sec. 3. Words in this act denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate.

Sec. 4. Section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington shall be and is hereby repealed: *Provided, however,* That the grant, terms and conditions of said section 183 shall apply to all suits now pending, and all causes of action thereunder for wrongful death accruing within three years immediately prior to the taking effect of this act.

Sec. 5. This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof.

Passed the Senate February 27, 1917.

Passed the House March 7, 1917.

Approved by the Governor March 14, 1917.